

No. 89-1667

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

COMMUNICATIONS SATELLITE CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission has authority under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, to enforce its 1978 prescription of a rate of return by requiring the carrier to refund revenues collected from August 1984 through December 1986 in excess of the maximum prescribed return.

(I)

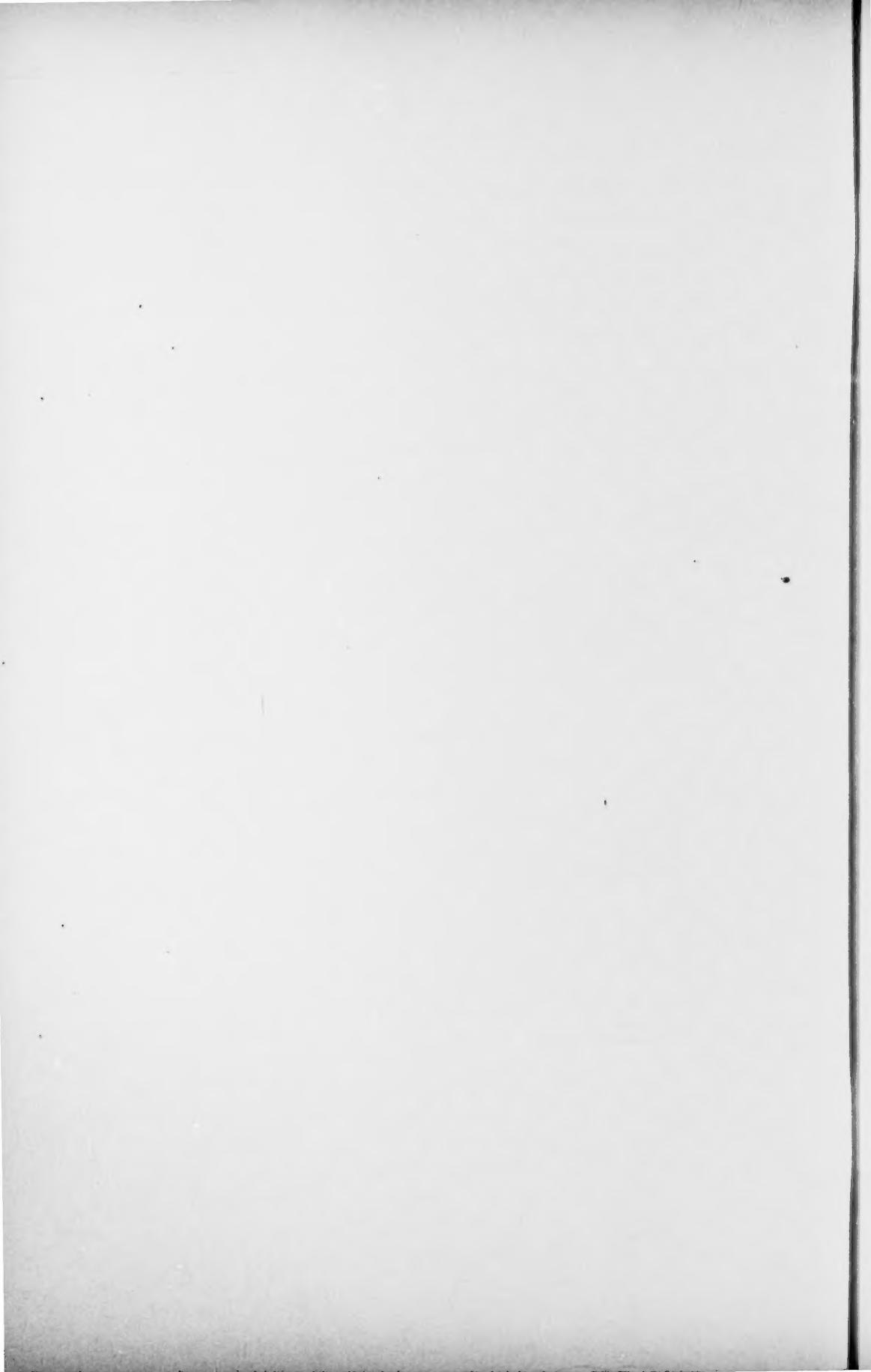


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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported. The order of the Federal Communications Commission (Pet. App. 3a-35a) is reported at 3 F.C.C. Rcd 2643.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1989. A petition for rehearing was denied on February 2, 1990. Pet. App. 74a. The petition for a writ of certiorari was filed on April 30, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, the Federal Communications Commis-

sion is responsible for ensuring that the regulations, classifications, charges, and practices of carriers of interstate and foreign communications are just, reasonable, and non-discriminatory. 47 U.S.C. 201(b), 202(a). The Act provides the Commission with a number of regulatory tools to carry out that broadly defined responsibility. In particular, under Section 205(a), the Commission may investigate a carrier's rates and practices; if, after a hearing, it finds that a rate or practice is or will be unlawful under the Act, the Commission may prescribe just and reasonable rates or practices "to be thereafter observed." 47 U.S.C. 205(a). Such a prescription is binding on the carrier, which "shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum * * * so prescribed * * * and shall conform to and observe the regulation or practice so prescribed." *Ibid.* Any such prescription is binding for the time specified in the Commission's order or until the Commission or a court of competent jurisdiction issues a superseding order. 47 U.S.C. 408.¹

The Commission has additional powers to investigate the lawfulness of proposed new practices or charges under Section 204 of the Act, 47 U.S.C. 204. The Commission may suspend the effectiveness of such practices or rates for up to five months pending its investigation. In the case of a proposed rate increase, if the Commission does not complete its investigation within the specified period of suspension, the Commission must allow the rate to take effect but may require the carrier to keep an accounting of the

¹ See *Permian Basin Area Rate Cases*, 390 U.S. 747, 779 (1968) (no "limitations of time" imposed by statute on agency prescription order); *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101, 1106-1107 (D.C. Cir. 1987), cert. denied, 109 S. Ct. 1942 (1989); *AT & T v. FCC*, 487 F.2d 865, 880 (2d Cir. 1973).

amounts it collects under the rate. At the end of the investigation, the Commission may order the carrier "to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge * * * as * * * shall be found not justified." 47 U.S.C. 204(a).

Supplementing those and other express provisions of the Act, Section 4(i) authorizes the agency to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. 154(i). This "necessary and proper clause" (*North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985)) gives the Commission the flexibility to implement Congress's broadly worded directives defining the Commission's rate regulation and other responsibilities.²

b. In 1972, the Commission, under its Section 4(i) authority to take necessary and proper measures to implement its Section 205 power to prescribe just and reasonable rates and practices, asserted the authority to prescribe the rate of return a carrier may earn. See *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101, 1104-1105 (D.C. Cir. 1987), cert. denied, 109 S. Ct. 1942 (1989); *Nader v. FCC*, 520 F.2d 182, 187-191 (D.C. Cir. 1975).³ The D.C. Circuit upheld that authority, ruling

² See, e.g., *City of New York v. FCC*, 486 U.S. 57, 66 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d at 1106-1109; *North American Telecomm. Ass'n v. FCC*, 772 F.2d at 1292-1293; *Nader v. FCC*, 520 F.2d 182, 203-205 (D.C. Cir. 1975).

³ The rate of return is one of the components of the formula that is typically used to determine the revenue requirements, and hence the rates, of a regulated company. The rate of return may be defined as "the amount of money a utility earns, over and above operating expenses, depreciation expense, and taxes, expressed as a percentage of the legally established net valuation of utility property, the rate

that such rate of return prescriptions are "necessary for the Commission to carry out its [ratemaking] functions in an expeditious manner." 520 F.2d at 204.⁴ The court explained that a rate of return prescription, like any other Section 205 prescription, is binding: it limits the utility prospectively to the prescribed return. *Id.* at 201. The court further pointed out that, although such a prescription protects the carrier from "the possibility of refunds on the ground that [the prescribed] rate of return [is] too high, the Commission retains full latitude to order refunds on all other grounds." *Id.* at 205 n.25.

Some ten years later, the Commission's authority was again challenged in the D.C. Circuit by various carriers—a challenge that was nearly identical to the one petitioner advances in this case.⁵ In *New England Telephone & Telegraph Co. v. FCC, supra*, the court of appeals held that the Commission had authority under Sections 4(i) and 205 to enforce its rate of return prescription by requiring carriers to refund earnings in excess of the prescribed return. The court stated that "the Commission may determine what *rate of return* must be thereafter observed in the same way it may set a just and reasonable *rate* to be thereafter observed."

base." P. Garfield & W. Lovejoy, *Public Utility Economics* 116 (1964). Under one common form of rate regulation, a regulated carrier is authorized to set rates that will recover its legitimate expenses (including depreciation and taxes) plus a reasonable return (the rate of return) on its rate base (the net investment in property that is used in providing service).

⁴ Cf. *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 150-155 (1962) (upholding FPC's order of refund based on determination of the reasonable rate of return, before any determination of how the costs of service should be allocated).

⁵ In *New England Telephone & Telegraph v. FCC, supra*, petitioner appeared as an amicus curiae in opposition to the Commission's authority before both the court of appeals on the petitions for review and this Court on the petitions for a writ of certiorari.

826 F.2d at 1106-1107. And the court recognized that the Commission, in prescribing a rate of return, did not merely require the carriers to file rates targeted to achieve the prescribed return. Rather, the Commission's prescription limited the carriers' earnings to the maximum prescribed level. *Id.* at 1106. Finally, the court of appeals rejected the carriers' contention that the refund order constituted retroactive ratemaking or distorted the regulatory balance between ratepayers and carriers. The court determined that the Commission's refund order was a permissible means of enforcing a prior prescription order that had been purely prospective. *Id.* at 1106-1109.⁶

2. a. Like *New England Telephone & Telegraph Co.*, this case involves the Commission's enforcement of a rate of return prescription. In February 1978, petitioner, Communications Satellite Corporation (Comsat), settled a protracted rate investigation with the Commission's staff. *Communications Satellite Corp.*, 68 F.C.C.2d 941 (1978), recon-sid. denied, 70 F.C.C. 2d 1449 (1979). Under the settlement agreement, Comsat's authorized annual rate of return would be 11.48 percent, with an additional one percent buffer or

⁶ The carriers, supported by petitioner as amicus curiae, filed petitions for a writ of certiorari, in which they principally challenged the Commission's statutory authority to order refunds as a means of enforcing a rate of return prescription. This Court denied certiorari. *Southern Bell Telephone & Telegraph Co. v. FCC*, 109 S. Ct. 1942 (1989); *New England Telephone & Telegraph Co. v. FCC*, 109 S. Ct. 1942 (1989).

In *AT & T Co. v. FCC*, 836 F.2d 1386, 1392 (D.C. Cir. 1988), the court of appeals reaffirmed the Commission's authority "to order refunds where a carrier has violated an outstanding rate-of-return prescription." Although the court invalidated the specific rules adopted in that case to implement an automatic refund policy, the court stated that "*New England Telephone* clearly defeats the claim that a refund scheme in conjunction with rate-of-return regulation is necessarily incompatible with the regulatory scheme embodied in the Communications Act." *Ibid.*

increment as an incentive for increased efficiency. Pet. App. 6a; 68 F.C.C. 2d at 954.⁷ The agreement also provided that the Commission's order approving the settlement agreement would have the effect of a Commission prescription. *Id.* at 955. In May 1978, the Commission approved the agreement, thereby prescribing a rate of return of 11.48 percent for Comsat. *Id.* at 941.

Comsat, however, filed a series of revised tariffs setting rates designed to achieve a higher rate of return and so informed the Commission. In April 1979, Comsat filed tariffs that projected an average return of 14.17 percent for the period July through December 1979. Pet. App. 7a.⁸ In December 1979, Comsat filed revised tariffs that projected average earnings would be 17.88 percent. *Ibid.* In October 1980, Comsat reduced its rates again, but informed the Commission "that its projected rate of return for 1981 with the new rates was between 14.2 and 16.7 percent." *Ibid.*⁹

⁷ The Commission uses the authorized rate of return to compute rates for communications services. The Commission, however, "has long recognized the imprecision inherent in requiring carriers to set tariff rates that will produce the exact level of revenues necessary to produce the anticipated return." Pet. App. 22a. As a consequence, the Commission establishes a range or increment above the prescribed level that defines the upper limit of a zone of reasonableness for earnings. See *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d at 1109. Generally, the Commission takes action to enforce a rate of return prescription only when, as in this case, a carrier exceeds both the prescribed rate of return and the additional increment. Pet. App. 23a. In this case, the Commission ordered Comsat to refund earnings in excess of 12.48 percent, the authorized return plus the one percent increment. *Ibid.*

⁸ In response to the Commission's inquiry, Comsat projected alternative rates of return of 9.8 and 12.6 percent for 1980, depending upon how the state of the economy affected demand. Pet. App. 7a.

⁹ Comsat later acknowledged that "the rates in effect from 1981 through July 1984 were targeted to achieve a rate of return in the range

The Commission did not reject or suspend Comsat's filed tariffs and thus the rates Comsat set became effective without any determination regarding their lawfulness. *Ibid.*; see 47 U.S.C. 204(a); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1234 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981).¹⁰

b. In 1980, the Commission initiated a separate rulemaking proceeding to review Comsat's corporate structure, operations, and accounting practices. See *Changes in the Corporate Structure and Operations of the Communications Satellite Corporation*, 81 F.C.C.2d 287 (1980). As a result of that proceeding, the Commission ordered Comsat in 1984 to file tariff revisions to conform to changes in its accounting and cost allocation system. The Commission also informed Comsat that it was "aware that Comsat's recent earnings [had] exceed[ed] authorized levels," and therefore ordered Comsat to file tariff revisions that would "be in compliance with [Comsat's] authorized rate of return (11.48%-12.48%)." *Changes in the Corporate Structure and Operations of the Communications Satellite Corporation*, 97 F.C.C.2d 145, 179 [Second Structure Order], reconsidered, denied in part, 99 F.C.C.2d 1040 (1984) [Second Structure Reconsideration Order]; Pet. App. 8a.

Comsat petitioned the Commission to reconsider its order requiring the firm to file tariffs that complied with the 1978 rate of return prescription, citing, among other things, changes that had occurred in the economy and the firm since 1978. The Commission rejected that argument:

Comsat had every opportunity since the 1978 Settlement Agreement to petition us for relief if it believed

of 14.25% to 15.4%." Pet. Supp. Resp. to Show Cause Order at 20, *In re Communications Satellite Corporation* (filed July 9, 1986).

¹⁰ At no time during this period did Comsat petition the Commission for a change in its rate of return prescription.

its authorized rate of return was too low and did not reflect * * * changed circumstances * * *. For whatever reason, it did not do so. Until it does so and until relief is granted, Comsat shall submit tariffs reflecting cost-based rates that will earn the corporation its authorized rate of return. Comsat simply cannot unilaterally modify its authorized rate of return.

Second Structure Reconsideration Order, 99 F.C.C.2d at 1055-1056. The Commission reiterated that Comsat was bound by the 1978 rate of return prescription and must set its rates to comply with that prescription. *Id.* at 1056, 1064. Comsat sought no further review of the Commission's determination.

3. a. In November 1985, the Commission released an order initiating an investigation into the lawfulness of Comsat's rates. *Communications Satellite Corp.*, CC Docket Nos. 80-634 and 85-268, Mimeo No. 0672 (Common Carrier Bureau, released Nov. 8, 1985), as modified by erratum, Mimeo No. 1703 (Common Carrier Bureau, released Dec. 27, 1985). As a result of the investigation, the Commission staff determined that Comsat's earnings between 1983 and 1986 had exceeded the maximum prescribed level by \$61.7 million. *Communications Satellite Corp.*, 2 F.C.C. Rcd 3706, 3707 (1987), modified, DA 87-526 (Common Carrier Bureau, released May 4, 1987). The staff therefore ordered Comsat to show cause why it should not refund the excess earnings to ratepayers. 2 F.C.C. Rcd at 3716.

Comsat contested the show cause order, principally contending that the Commission "does not have the power [outside of Section 204] to order refunds for the violation of a rate of return prescription." Pet. App. 10a. In addition, Comsat argued

that the [Commission's] 1979 and 1980 decisions to accept tariffs that were expressly targeted to produce a greater return effectively vacated the 1978 rate of return prescription * * * [and] that, even if the prescription remained effective, it would be inequitable to apply that prescription to periods that precede the *Second Structure* decisions which "revive" the 1978 prescription.

Ibid.

b. In January 1988, the Commission released its final decision, ordering Comsat "to refund to its customers taking service between August 1, 1984 and December 31, 1986, the aggregate sum of \$38,775 million dollars, representing the revenues accrued during that period in excess of 12.48 percent return and accrued interest." Pet. App. 29a.

The Commission found that "Comsat's general arguments relating to [the] Commission's refund power are essentially the same as the arguments * * * presented * * * [and] decisively rejected [by the court of appeals in *New England Telephone & Telegraph Co. v. FCC, supra*]." Pet. App. 10a. Accordingly, the Commission reaffirmed its authority to order refunds under Sections 4(i), 201(b), and 205(a) of the Act. Pet. App. 10a-11a, 29a. The Commission rejected Comsat's contention that the Commission's previous acceptance of its tariffs effectively "vacated" the 1978 rate of return prescription. The Commission reminded Comsat that the *Second Structure* orders "unequivocally concluded that the 1978 prescription is still in effect and will remain in effect until a proceeding is initiated and completed to vacate or modify that prescription." *Id.* at 13a.¹¹ Since "Comsat did not appeal those decisions," the Commission concluded, it "should not be permitted to reopen the question." *Ibid.*

¹¹ The Commission pointed out that neither the Commission nor its staff had issued any order "that purported to vacate, modify or waive the rate of return prescription." Pet. App. 14a.

Finally, the Commission found "some merit" to Comsat's contention that refunds should not be ordered for the period before release of the *Second Structure Order* in 1984. *Id.* at 14a. Exercising "the equitable discretion inherent in agency consideration of refund matters," *id.* at 5a, the Commission directed Comsat to refund only those excess earnings that had accrued after August 1, 1984—the effective date of the tariffs filed in compliance with the *Second Structure Order*. *Id.* at 15a.

4. Comsat then filed a petition for review of the Commission's refund order in the District of Columbia Circuit. After certain procedural maneuvers,¹² the Commission in August 1989 moved for summary affirmance in light of the court's recent decision in *New England Telephone & Telegraph Co. v. FCC, supra*.

In November 1989, the court of appeals summarily affirmed the Commission's refund order in a brief unpublished order. Pet. App. 1a-2a. The court of appeals concluded that "[t]he issues presented in [Comsat's] petition for review are controlled by this court's decision in *New England Telephone & Telegraph Co. v. FCC, * * ** which is binding precedent in this circuit until rejected by the court *en banc*

¹² The court of appeals held Comsat's petition pending disposition of the petition for rehearing and the suggestion of rehearing en banc filed in *New England Telephone & Telegraph Co. v. FCC, supra*. Order, *Communications Satellite Corp. v. FCC*, No. 88-1243 (D.C. Cir. May 17, 1988). As a result of the full court of appeals' denial of en banc rehearing of that case, see Order, *New England Telephone & Telegraph Co. v. FCC*, No. 85-1087 (D.C. Cir. Nov. 2, 1988), petitioner asked the court of appeals initially to hear its case en banc. The court denied that request. Order, *Communications Satellite Corporation v. FCC*, No. 88-1243 (D.C. Cir. Aug. 3, 1989).

or overruled by the Supreme Court." *Id.* at 1a. The court accordingly held that "[t]he merits of the parties' positions are * * * so clear as to justify summary action." *Id.* at 1a-2a.¹³

ARGUMENT

Following its decisions in *New England Telephone & Telegraph Co. v. FCC*, *supra*, and *Nader v. FCC*, *supra*, the court of appeals correctly held that the Commission had authority under Section 4(i) to enforce its earlier rate of return prescription by directing Comsat to pay back its excess collections. That ruling, in an unpublished order, does not conflict with any decision of this Court or of any other court of appeals. Moreover, petitioner's principal challenge to the decision below raises the same issues the Court declined to review last Term in *Southern Bell Telephone & Telegraph Co. v. FCC*, 109 S. Ct. 1942 (1989), and *New England Telephone & Telegraph Co. v. FCC*, 109 S. Ct. 1942 (1989). Petitioner offers no persuasive reason for the Court to take a different approach here.¹⁴ Accordingly, further review of this case is not warranted.

1. Petitioner principally contends that the Commission's use of Section 4(i) to enforce rate of return prescriptions impermissibly "replace[s] the statutory scheme of prospective ratemaking set forth in the Communications Act with

¹³ On February 2, 1990, the court of appeals denied Comsat's petition for rehearing and suggestion of rehearing en banc. Pet. App. 74a-75a. Judges Buckley, Williams, and Sentelle dissented from the denial of rehearing en banc. *Id.* at 75a.

¹⁴ Petitioner asserts that the decision below "ha[s] far-reaching implications for a host of industries subject to federal rate regulation, touching virtually every aspect of the economy." Pet. 9. That assertion is groundless where, as here, the court of appeals' decision—a brief unpublished order—has little, if any, precedential value by virtue of D.C. Cir. G.R. 11(c), and thus affects only the parties to this case.

an FCC-devised scheme of retroactive rate regulation." Pet. 8-9; see Pet. 8-26.

a. The Commission has the authority, under Section 4(i) in conjunction with Section 205, to prescribe rates of return for the communications carriers it regulates. Section 205 permits the Commission to prescribe just and reasonable "charges," and Section 4(i) broadly authorizes the Commission to make rules and to issue orders that are "necessary in the execution of its functions." Prescribing a rate of return allows the Commission to settle one of the critical issues that determine the lawfulness of particular rates, freeing both carriers and the Commission to focus on the other issues, such as rate structures and the validity of elements of the rate base and of particular expenses. Such authority is well within the broad authority that ratemaking agencies have "to make the pragmatic adjustments which may be called for by particular circumstances." *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-777 (1968) (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)). Such authority has been well established since 1975, and, indeed, petitioner appears to recognize as much. See Pet. 13-16 & n.45.¹⁵

A prescription issued under Section 205 has binding, coercive effect. Section 205 declares that a "charge" or "practice" prescribed under that provision is "to be thereafter observed"; and Section 205 further states that carriers "shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum

¹⁵ The D.C. Circuit expressly affirmed the Commission's authority to prescribe rates of return in 1975, *Nader v. FCC*, 520 F.2d at 203-206, explaining that such prescriptions are "necessary for the Commission to carry out its [ratemaking] functions in an expeditious manner," *id.* at 204. The court has since reaffirmed that authority. See *AT & T v. FCC*, 836 F.2d at 1389, 1392 (); *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d at 1104, 1106-1107.

* * * so prescribed * * * and shall conform to and observe the regulation or practice so prescribed." 47 U.S.C. 205(a).¹⁶ Before the issuance of the 1978 prescription at issue here, moreover, *Nader v. FCC* made clear that a rate of return prescription had the binding effect of limiting the carrier to the prescribed rate of return (plus the buffer or increment). 520 F.2d at 201-202. Indeed, as this Court has acknowledged, when an agency exercises its power to prescribe "it speaks as the legislature, and its pronouncement has the force of a statute." *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 386 (1932).

An inherent and necessary corollary of the power to adopt binding rate of return prescriptions is the authority to enforce those prescriptions. This Court has often recognized in the ratemaking context that "the width of administrative authority must be measured in part by the purposes for which it was conferred * * *." *FPC v. Texaco Inc.*, 417 U.S. 380, 389 (1974) (quoting *Permian Basin Area Rate Cases*, 390 U.S. at 776). Section 4(i), which serves as a "necessary and proper" clause, *North American Telecomm. Ass'n v. FCC*, 772 F.2d at 1292-1293, consequently enables the Commission to carry out its statutory responsibilities with the flexibility it needs to regulate communications carriers. That provision authorizes agency action that, although not specifically enumerated in the Communications Act, is reasonably calculated to achieve the express objectives of the Act. See, e.g., *United States v. Southwestern Cable Co.*,

¹⁶ A prescription order remains binding "for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order." 47 U.S.C. 408. Cf. *Permian Basin Area Rate Cases*, 390 U.S. at 779 ("Nothing in [15 U.S.C. 717(d)(a)] imposes limitations of time upon the effectiveness of rate determinations issued under it; rather, the section provides that rates held to be just and reasonable are 'to be thereafter observed'").

392 U.S. 157, 181 (1968). The enforcement of a prescription that is authorized under Section 205 is at the core of the enforcement authority that Section 4(i) grants the Commission.

As the court of appeals recognized here and in *New England Telephone & Telegraph Co. v. FCC, supra*, once the validity of rate of return prescriptions and the Commission's authority to enforce such prescriptions are accepted, the power to require refunds readily follows as a necessary tool to enforce the rate of return prescription. A refund is not only the most obvious means of ensuring that a directive establishing a maximum rate of return is not violated; it may be the only effective remedy, because not until revenues are actually collected can it be determined whether the carrier exceeded the prescribed rate of return. Thus, as the court of appeals stated in *New England Telephone & Telegraph Co. v. FCC*, the Commission's choice of a refund remedy to enforce a rate of return prescription, in "a strictly technical sense," was "absolutely necessary" because otherwise "the carriers in fact would not be limited to [the prescribed] return * * * and the prescription would be violated." 826 F.2d at 1107-1108.¹⁷

In any event, the Commission "enjoys significant discretion to choose among a range of reasonable remedies, including refunds." *New England Telephone & Telegraph Co.*

¹⁷ Comsat suggests that the Commission's available remedy "under a rate of return regime [is] to direct the carrier to file new rates reasonably calculated to achieve the appropriate level of return." Pet. 22. That suggestion, however, ignores the fact that the Commission already had issued an order — the rate of return prescription — that had been violated and had reaffirmed that prescription in the *Second Structure Order*. Nothing in the statutory scheme supports the suggestion that the only enforcement tool for violation of an agency order is to issue another order that may itself be violated.

v. FCC, 826 F.2d at 1108.¹⁸ The use of refunds is a well-established remedial device in utility regulation. See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. at 825-828; *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 150-155 (1962). And the use of refunds to enforce a rate of return prescription in particular is consistent with the Communications Act. As petitioner points out (Pet. 11-13), Section 204(a), which empowers the Commission to investigate rate increases and to require refunds, is the only statutory provision that expressly authorizes the Commission to order refunds. That provision, however, does not itself suggest that such a grant of authority bars the Commission from ordering refunds as a remedy for the violation of an existing and binding prescription order.

Indeed, compensatory remedies are expressly provided for in other common carrier provisions of the Communications Act. Under Section 206, for example, a carrier may be “liable * * * for the full amount of damages” resulting from its unlawful act. 47 U.S.C. 206. Moreover, a person injured by a common carrier can file a complaint with the Commission “for the recovery of damages for which such common carrier may be liable,” 47 U.S.C. 207, and the Commission may order the payment of money to the complainant if justified, 47 U.S.C. 209. It would therefore be inconsistent with the longstanding approach to the interpretation of the broadly worded ratemaking statutes to suggest – and the court of appeals properly declined to do so – that the Commission, when choosing a means of enforcing an order which is authorized but not specifically

¹⁸ Accord *Nader v. FCC*, 520 F.2d at 203; see *General Telephone Co. v. United States*, 449 F.2d 846, 865 (5th Cir. 1971) (courts “must give deference to the choice of remedy selected by the agency,” which should be upheld if it is “reasonably calculated to effectuate the policies of the Communications Act”).

mentioned in the statute, is somehow forbidden to adopt remedies that are specifically provided for elsewhere in the statute.¹⁹

b. Contrary to Comsat's contention, the requirement that it refund earnings in excess of the prescribed maximum return does not violate the rule against retroactive ratemaking. The obligation that the Commission enforced was set prospectively in 1978 when the Commission issued its rate of return prescription. The refund order merely imposed a remedy for Comsat's violation from August 1984 through December 1986 of the duty that was imposed in 1978. In other words, the refund in this case flows not from a retroactive adjudication that Comsat's rate of return after August 1, 1984, was too high, but rather from the prospective restriction imposed on Comsat's earnings by the 1978 prescription. See *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d at 1108 (the refund order "merely recognized that the prior prescription had been violated and imposed a remedy for that violation").

For that reason, Comsat's assertion (Pet. 17-22) that the decision below conflicts with many decisions concerning retroactive ratemaking is incorrect.²⁰ None of those

¹⁹ See, e.g., *FPC v. Natural Gas Pipeline Co.*, 315 U.S. at 585 (where refund order not explicitly authorized under the Act was in interest of the public and was "in harmony with the purposes of the Act," agency had discretion to issue it under the statutory provision authorizing orders that are necessary or appropriate to carry out provisions of the Act); cf. *Wisconsin v. FPC*, 373 U.S. 294, 309 (1963) ("to declare that a particular method of rate regulation is so sanctified as to make it highly unlikely that any other method could be sustained would be wholly out of keeping with this Court's consistent and clearly articulated approach to the question of the Commission's power to regulate rates").

²⁰ In both *Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 389-390 (1959), and *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. at 390, for example, the Court concluded that an agency, under its statutory authority to adopt prescriptions,

decisions involved the situation at issue in this case — agency action enforcing an existing, prospectively defined prescription. Here, the rate of return prescription made it unlawful for Comsat to maintain rates in excess of the maximum return. None of the cases cited by Comsat forbids a ratemaking agency's use of a refund to enforce, in a practical, administratively efficient manner, a valid prospective Commission order.

Similarly, the Commission's choice of remedy to enforce its rate of return prescription does not disturb the balance between the interests of carriers and customers that Congress has established in the Communications Act. To the contrary, the Commission's order properly respects the statutory balance of carrier and ratepayer protection.

First, the Commission permitted Comsat a margin of one percent above the prescribed just and reasonable level of 11.48 percent, recognizing the imprecision of ratemaking and providing the carrier with an incentive for efficiency. Only when — and to the extent that — Comsat exceeded both the 11.48 percent prescription and the one percent margin did the Commission require a refund. The Commission's actions thus "more than adequately protected the carriers' interests in relation to the * * * rate-of-return prescription." *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d at 1109.

Second, the prescription protected Comsat from the possibility that the Commission would order a refund on the ground that the prescribed *rate of return* was too high. Thus, if the cost of capital had fallen — after the Commis-

could not order refunds for the time period *before* the prescription was adopted. Here, by contrast, the Commission ordered the refund as a means of remedying the carrier's violation of an existing prescription. The decision below is thus consistent with *Atlantic Refining* and *Arizona Grocery*.

sion's prescription order had become effective—so that Comsat's achieved return had been far above a level reasonably necessary to attract investment, the Commission would have been foreclosed by its prescription order from requiring a refund on that basis (as long as Comsat's return complied with the prescription). See *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d at 1108. Instead, the Commission would have had to initiate and to complete a proceeding to revise its prescription order prospectively in order to eliminate that protection from Comsat and to lower its prescribed ceiling to the level justified by the changed conditions.

Third, the provisions of the statute embody a distinction between carriers and ratepayers that the refund order reflects. See *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d at 1108-1109. Thus, while carriers propose their own rates, and may seek increases when appropriate, ratepayers do not have a comparable power of initiation: they must generally rely on the Commission for protection. The Commission's order here assists in that protection. Indeed, the Commission's order is consistent with statutory provisions that permit recovery from a carrier for violations of a duty under the Act. 47 U.S.C. 206-209. In short, requiring Comsat to refund earnings it received in violation of an outstanding prescription did not disturb the statutory balance of interests, but rather vindicated that balance.

Finally, the Commission did not require Comsat to refund even the entire amount of its overcharges over the one percent buffer. Rather, the Commission exercised equitable discretion in limiting the refund to the excess earnings that accrued after the issuance of the *Second Structure Order* in 1984. See p. 10, *supra*.

2. Comsat also contends (Pet. 26-28) that the court of appeals failed to consider its "fundamental argument" that the Commission effectively nullified the 1978 prescription when it accepted Comsat's tariffs that were targeted to exceed the prescribed rate of return. In *New England Telephone & Telegraph Co. v. FCC*, *supra*, one carrier had raised a similar argument, contending that the rate of return prescription at issue there had been superseded when the Commission had accepted the tariffed rates. See GTE Br. at 9-10, *Telecommunications Research & Action Center v. FCC*, No. 85-1085 (D.C. Cir.).²¹ In affirming the Commission's order, however, the court of appeals rejected that argument, explaining that the rate of return prescription underlying the refund obligation at issue "had 'the force of a statute'" and was "binding" on the carrier. *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d at 1107 (quoting *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. at 386). The proper route for a carrier to seek relief from an allegedly deficient prescription, the court stated, was to petition the Commission to increase the prescribed rate of return. *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d at 1105, 1109, 1110. Since in *New England Telephone & Telegraph Co. v. FCC*, *supra*, the D.C. Circuit had determined that a carrier's unilateral tariff filings did not nullify a rate of return prescription, the court of appeals here correctly concluded that that decision foreclosed the identical issue raised by Comsat. See Pet. App. 1a-2a.

In any event, Comsat failed to raise that issue at the appropriate time before the Commission. In the *Second Structure* proceeding, the Commission "unequivocally con-

²¹ That particular proceeding was consolidated with others on petitions for review before the court of appeals under the caption *New England Telephone & Telegraph Co. v. FCC*. See 826 F.2d at 1106.

cluded that the 1978 prescription is in effect and will remain in effect until a proceeding is initiated and completed to vacate or modify that prescription." Pet. App. 13a. Comsat did not seek judicial review of the Commission's determination and did not ask the Commission to modify its prescription. The Commission therefore properly determined that Comsat "should not be permitted to reopen the question." *Ibid.*

Finally, Comsat's argument collapses on the merits. Section 408 provides that a Commission order "shall continue in force * * * until the Commission or a court of competent jurisdiction issues a superseding order." 47 U.S.C. 408; see also 47 U.S.C. 205(a) (prescriptions are to be "thereafter observed"). The Commission's acceptance of a tariff that becomes effective by operation of law (47 U.S.C. 204(a)) is not an agency determination that the components of the tariff—the filed rates or the rate of return—are lawful. See, e.g., *Aeronautical Radio, Inc. v. FCC*, 642 F.2d at 1234; cf. *Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. at 452-454. By filing tariffs targeted to exceed its prescribed return, Comsat could violate the rate of return prescription, but could not nullify it.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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* The Solicitor General is disqualified in this case.